APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 00-2349

KARIN SKOLD VAN SLYKE,
Plaintiff-Appellant,

v.

NORTHROP GRUMMAN CORPORATION,
Defendant-Appellee.

Appeal from the United States District Court
for the District of Maryland, at Baltimore.
William M. Nickerson, District Judge.
(CA-98-2791)

Argued: May 10, 2001
Decided: August 27, 2001

OPINION

Before NIEMEYER and GREGORY, *Circuit Judges*, and Arthur L. ALARCON, *Senior Circuit Judge* of the United States Court of Appeals for the Ninth Circuit, sitting by designation.

PER CURIAM:

Karin Skold Van Slyke ("Van Slyke") appeals the district court's order granting summary judgment to Northrop Grumman Corporation ("Northrup Grumman") on her claims of gender-based employment discrimination. Finding no error, we affirm.

I.

Van Slyke worked as an engineer for Northrop Grumman and its predecessor, Westinghouse Electric Corporation, from 1978 until 2000. Throughout her employment, Van Slyke progressed from a salary Code 27 (or Code 07, as it was termed when Van Slyke started at Westinghouse) to a salary Code 35, resulting in a pay increase from $16,000 to $73,400. Van Slyke, though, never attained the highest Code level available to engineers, Code 36, which denoted a management level position.

Northrop Grumman did not have a fixed number of managerial positions, but instead promoted engineers to Code 36 depending on the particular job duties assigned to the employee, the employee's level of responsibility, and the employee's proven management contribution. Northrop Grumman admits that its promotion scheme was unconventional and that movement between codes was not predicated on a traditional, competitive promotion system. Instead, it was determined by the nature of the work performed and the degree of responsibility given. A promotion to Code 36 also was predicated on an employee's department manager's recommendation.

From 1995 until Spring 1998, Van Slyke worked in Northrop Grumman's Electronic Sensors and Systems Sector ("ESSS"), which was responsible for the development and production of sophisticated electronic systems for the national defense and civil aviation. Specifically, Van Slyke worked in the Advanced Radar and Avionics Department ("ARAD") of the Systems Development and Technology Division ("SD&T"). Her direct supervisors there were Richard Davis and Kevin Leahy. Northrop Grumman admits that Davis and Leahy knew Van Slyke sought a Code 36 promotion. Additionally, it is undisputed that Van Slyke often took the initiative in her attempts to attain such a promotion, seeking

Davis and Leahy's advice regarding promotions and unilaterally making decisions she thought would help her obtain a promotion.

In 1997 and 1998, Davis worked with Van Slyke to set performance objectives and assign responsibilities on particular programs that could be expected to eventually provide Van Slyke with management opportunities. Van Slyke, though, did not follow up on some opportunities offered to her. For example, in 1996, Davis and Van Slyke agreed that she should work on the CryoRadar Program because it could provide her with the opportunity for eventual advancement to Code 36. Within a few months of accepting the assignment, though, Van Slyke asked Davis to decrease her workload and allow her to take a supporting role on another program, which did not involve a management role. When Van Slyke completed work on the other project, she returned to CryoRadar, but provided only "cost proposal support."

Similarly, in February 1998, Van Slyke and Leahy agreed that he would work with her to find job opportunities warranting a Code 36 promotion. They jointly determined that such an opportunity could be available in managing the cost proposal for the Radar Technology Insertion Program ("RTIP"). Leahy testified that he believed Van Slyke would have received a Code 36 promotion had she remained with RTIP and Northrop Grumman been awarded the contract for the project. Van Slyke testified that her RTIP supervisor, Joel Brown, promised her a promotion if Northrop Grumman landed the contract.

Van Slyke, though, asked Leahy to reassign her RTIP responsibilities to someone else after only two months, stating that she would be "pleased to take on the more appropriate role of supporting" a program manager.

Van Slyke alleges that Leahy and Davis repeatedly passed her over for Code 36 promotions. She claims that three less-

experienced men, R. Tranchini, E. Capelle and P. Reid,* received Code 36 promotions in 1997-98 and that Northrop Grumman never considered her for the management positions they received. Leahy concedes that Van Slyke could have held the specific positions given to Tranchini, Capelle and Reid and that she was not considered for their specific positions.

Throughout her tenure at Northrop Grumman, Van Slyke generally received favorable performance reviews. However, a few supervisors noted that she gravitated to supporting roles and lacked leadership abilities. Additionally, Van Slyke consistently ranked near the bottom of members in her department in terms of relative contribution to the organization.

According to Van Slyke, she was the only female engineer in ARAD. When she transferred out of ARAD in 1998, all of the department's 29 male engineers were either in Code 36 management positions or were slated to receive such positions by the end of 1998. Additionally, Van Slyke contends that women headed only one of 26 departments within SD&T and that, while women comprised 7.8% of the more than 1600 managers in ESSS, they comprised only 4.9% of managers in SD&T.

In December 1997, Van Slyke filed a Title VII charge with the EEOC, contending that Northrop Grumman failed to promote her because of gender discrimination. The EEOC issued a notice of right to sue in July 1998 and Van Slyke filed suit in August 1998. Northrop Grumman moved for

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* On appeal and in the court below, Van Slyke extended this list of comparators to include two additional men promoted in the same time period. The district court refused to consider claims relating to these additional men, thereby restricting Van Slyke to the three men she mentioned in her complaint and in her interrogatory responses. *Van Slyke v. Northrop Grumman*, 115 F. Supp.2d 587, 592 n. 4 (D. Md. 2000).

summary judgment after the close of discovery, which the district court granted on September 18, 2000. *Van Slyke v. Northrop Grumman*, 115 F. Supp.2d 587 (D. Md. 2000).

In granting summary judgment, the district court first limited Van Slyke's claims to actions occurring after February 1997, i.e. 300 days before she filed an EEOC charge. *Id.* at 593. *See also Beall v. Abbott Laboratories*, 130 F.3d 614, 620-21 (4th Cir. 1997). The district court rejected Van Slyke's "continuing violation" argument, which was based on her contention that Northrop Grumman's promotion structure was "secretive." *Id.* The district court agreed that the promotion process was informal, but explained that the record was devoid of any evidence suggesting that it was secretive. Moreover, the district court noted that, even if the promotion structure was"secretive," Van Slyke acknowledged familiarity with the program. Finally, the district court held that the allegedly discriminatory acts that Van Slyke relies upon, which occurred more than 300 days before she filed with the EEOC, should have put her on earlier notice of possible discrimination. *Id.* at 594.

Next, the district court ruled that Van Slyke established a *prima facie* case of discrimination, *id.* at 594-96, and that Northrop Grumman adequately asserted a legitimate, non-discriminatory reason for failing to promote Van Slyke—that the comparators she identified were more qualified for their positions than Van Slyke. *Id.* at 596-97. The district court rejected Van Slyke's argument that Northrop Grumman was not entitled to a "superior qualifications" defense by failing to consider her for the comparators' specific positions. *Id.* at 596-97. The district court distinguished the line of cases Van Slyke relied upon for this proposition and explained that Northrop Grumman was aware of Van Slyke's qualifications and "repeatedly met with her to discuss positions in accord with her qualifications and skills." *Id.*

Finally, the court held that Van Slyke failed to establish that Northrop Grumman's proffered legitimate, non-discriminatory reason was pretextual. *Id.* at 597-98. The district court rejected Van Slyke's statistical defense, explaining that "statistical evidence has little, if any, relevance in an individual disparate treatment action." *Id.* at 597.

Additionally, the district court rejected Van Slyke's assertion that she was better qualified than her comparators, explaining that "[t]he mere assertion [by the plaintiff] that [the plaintiff] was more qualified is insufficient to establish pretext." *Id.* at 598 (quoting *Lowery v. Circuit City Stores, Inc.*, 158 F.3d 742, 763 (4th Cir. 1998), *vacated on other grounds*, 527 U.S. 1031 (1999)).

III.

This Court reviews a grant of summary judgment *de novo*. *Higgins v. E. I. DuPont de Nemours & Co.*, 863 F.2d 1162, 1167 (4th Cir. 1988). Summary judgment is appropriate only if there are no material facts in dispute and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). A material fact is in dispute when its existence or non-existence could lead a jury to different outcomes. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A genuine issue exists when there is sufficient evidence on which a reasonable jury could return a verdict in favor of the non-moving party. *Id.* Mere speculation by the non-moving party cannot create a genuine issue of material fact. *Beale v. Hardy*, 769 F.2d 213, 214 (4th Cir. 1985). The Court must view the evidence in the light most favorable to the non-moving party. *Smith v. Virginia Commonwealth Univ.*, 84 F.3d 672, 675 (4th Cir. 1996) (en banc).

We have reviewed the record, briefs, and pertinent case law on this matter de novo, and have had the benefit of oral

argument. Our careful review persuades us that the district court's ruling was correct. Accordingly, we affirm the grant of summary judgment to Northrop Grumman on the reasoning set forth in the district court's order. *See Van Slyke v. Northrop Grumman*, 115 F. Supp.2d 587 (D. Md. 2000).

AFFIRMED

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

Civil Action WMN-98-2791

KARIN SKOLD VAN SLYKE,

v.

NORTHROP GRUMMAN CORPORATION.

MEMORANDUM

Before the Court is Defendant's Motion for Summary Judgment (Paper No. 84).[1] The motion is ripe for decision. Upon a review of the motion and the applicable case law, the Court determines that no hearing is necessary (Local Rule 105.6) and that Defendant's motion will be granted.

I. BACKGROUND

This Title VII action arises out of Plaintiff's employment as an engineer at Northrop Grumman Corporation (Northrop). Plaintiff has been employed at Northrop, or its predecessor,

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[1] Also before the Court is Plaintiff's Motion to Strike Improper Materials (Paper No. 88) and Defendant's Motion to Strike Declarations of Karin and Eric Van Slyke (Paper No. 91). Defendant's Motion will be denied as moot. Plaintiff acknowledges that parts of her and her husbands declarations are inadmissible. See Pl's.ns that are admissible, the Court finds that Plaintiff is unable to sustain her discrimination claim.

As for Plaintiff's Motion, it will also be denied as moot, as the Court finds that it need not make reference to the disputed materials in deciding the sufficiency of Plaintiff's discrimination claim.

Westinghouse Electric Corporation, since 1978.[2] Plaintiff claims that she was discriminated against on the basis of her gender in that she was denied promotional opportunities provided to male employees. Plaintiff is employed at Defendant's BWI facility in its electronic systems business unit, known as the Electronic Sensors and Systems Sector (ESSS). ESSS is responsible for the development and production of sophisticated electronic systems for the nation's defense and civil aviation, in addition to other domestic and international applications. From 1990 through May 1998, Plaintiff worked in the Advanced Radar and Avionics Department (ARAD) of ESSS's Systems Development and Technology subdivision (SD&T). Under Defendant's present code salary system, Plaintiff's salary has increased from a Code 27 to a Code 35 (approximately 250%, from $16,000 to $73,500) during her years of employment.

Plaintiff alleges, however, that she was repeatedly passed over in consideration for promotions to Defendant's program management code [3] (Code 36 or higher), even though she expressly made known her desire for such advancement and demonstrated her managerial qualifications by aiding others in managing various programs. Plaintiff specifically contends that in September 1997, three less experienced men, Reid,

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[2] It appears from the parties' pleadings, that Plaintiff remains employed with Defendant.

[3] As discussed below, Defendant admits that its promotion scheme is unconventional, as "movement between codes is not predicated on a traditional, competitive promotion system" but rather is determined by "the nature of the work performed and the associated degree of responsibility." Mot. at 6-7. Plaintiff's department manager, Richard Davis, testified that the method used for promotions was for a manager to identify the potential candidate for promotion based on the scope and responsibilities of work the individual was currently doing and to identify if the current work scope and responsibility was above their current code." There was no formal application process for promotion. *Id.* at 7.

Capelle and Trachini, were promoted in preference to her.[4] Defendant counters that Plaintiff was not promoted because she repeatedly avoided work in managerial positions on programs which would have enabled her to be considered for promotion to management code. Defendant further argues that the employees promoted were better qualified for the positions. Plaintiff contends that the positions that she was offered were deadends with no promotion potential and that she, in fact, was better qualified for promotion.

II. ANALYSIS

Pursuant to Rule 56(c) of the Federal Rules of Civil Procedure, summary judgment is appropriate where "there is no genuine issue as to any material fact and . . . the moving party is entitled to summary judgment as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). For purposes of summary judgment, a dispute about a fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party," and a fact is material if, when applied to the substantive law, it affects the outcome of litigation. *Anderson*, 477 U.S. at 248.

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[4] Plaintiff, in her Opposition, expands this list to include two other men promoted in the same time period. Plaintiff's Opp. at 2. Plaintiff is restricted in argument to the three men to which she first alluded in her complaint and later specifically identified in answer to an interrogatory. Complaint at ¶ 6; Pl's Interrog. Resp. No. 5; *See Diamond v. T. Rowe Price Assocs, Inc.*, 852 F.Supp. 372, 406 n.165 (D. Md. 1994) (court found Plaintiff's attempt in her opposition to defendant's motion for summary judgment to enlarge an earlier list of comparators was untimely and prejudicial to defendant, as defendant had relied on the earlier list as its basis for discovery into and analysis of plaintiff's promotion claim). Here, allowing Plaintiff to now expand her list of comparators would be prejudicial to Defendant, as Defendant relied on Plaintiff's interrogatory answer identifying three, not five, comparators as the basis for its discovery.

A party seeking summary judgment bears the initial responsibility of informing the court of the basis of its motion and identifying the portions of the opposing party's case which it believes demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). When considering the motion, the court assumes that all of the non-moving party's evidence is worthy of belief and justifiable inferences are drawn in favor of the non-moving party. *Matsushita Elec. Indust. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). If the movant demonstrates that there is no genuine issue of material fact and that she is entitled to summary judgment as a matter of law, the non-moving party must, in order to withstand the motion for summary judgment, produce sufficient evidence in the form of depositions, affidavits or other documentation which demonstrates that a triable issue of fact exists for trial. *Celotex*, 477 U.S. at 324. The existence of only a "scintilla of evidence" is not enough to defeat a motion for summary judgment. Instead, the evidentiary materials must show facts from which the finder of fact could reasonably find for the non-moving party. *Anderson*, 477 U.S. at 252. At the summary judgment phase, it is not appropriate for the court to make credibility determinations, weigh the evidence, or draw inferences from the facts which are adverse to the nonmoving party; these are jury functions. *Anderson*, 477 U.S. at 255.

A. Scope of Plaintiff's Claim

The two jurisdictional prerequisites to a Title VII action are (1) filing timely charges of employment discrimination with the EEOC; and (2) receiving and acting upon the EEOC's notice of the right to sue. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 798 (1973). In Maryland, a charging party must file an EEOC charge within 300 days of the alleged unlawful employment practice. 42 U.S.C. § 2000e-5(e)(1). If a charging party fails to comply with this statutorily mandated filing period, alleged discriminatory acts

which occurred more than 300 days prior to the filing of the EEOC charge may not be subsequently challenged in a Title VII suit. *Beall v. Abbott Laboratories*, 130 F.3d 614, 620-21 (4th Cir. 1997).

Following the above reasoning, Defendant argues that conduct that is alleged to have occurred prior to February 1997 (300 days prior to Plaintiff's filing her charge of sex discrimination with the EEOC) cannot be part of the basis for her claim.[5] Plaintiff counters that "Defendant's constant and continuing failure to promote" Plaintiff constitutes a "continuing violation" under Title VII, thus enabling her to circumvent the 300 day requirement. Opp. at 23-25. An exception to the 2000e-5(e)(1) timely filing requirement is recognized where there are continuing violations. A continuing violation may consist of either a series of related acts, *Beall*, 130 F.3d at 620-21, or the maintenance of a discriminatory policy or system. *See* Lindemann, B. & Grossman, P., *Employment Discrimination Law* 1361 (3d. ed. 1996). The theory is available only if an actual violation has occurred within the required limitations period. *Beall*, 130 F.3d at 620-21.

A useful analysis borrowed from the Fifth Circuit, which is consistent with Fourth Circuit precedent, is found in *Berry v. Board of Supervisors*, 715 F.2d 971, 981 (5th Cir. 1983). There, the Fifth Circuit recommended a non-exhaustive list of three factors to consider in determining the existence of a continuing violation. First, do the alleged acts involve the same type of discrimination? *Berry*, 715 F.2d at 981; *Khan v. Jenkins*, 1987 WL 36862 at *3 (4th Cir. 1987) ("a continuing violation can be shown only by allegations detailing the same type of discriminatory action or violation"), *cert. denied*, 484 U.S. 1061 (1988). Second, are the incidents recurring or are

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[5] It appears from the record that Plaintiff claims knowledge of acts of sex discrimination occurring as early as 1978. *See* Compl. ¶ 4; Pl's Dep. at 21-192; Pl's Interrog. Resp. No. 3.

they independent and isolated events? *Berry*, 715 F.2d at 981. Finally, did the earlier acts have sufficient permanency to trigger the employee's awareness of and duty to challenge the alleged violation? *Id.*; Lindemann & Grossman at 1362 ("courts frequently reject continuing violation claims when the plaintiff understood the earlier action(s) were not to be temporary or tentative—particularly when the plaintiff was aware of, or at least suspected discrimination at the time the earlier action(s) were taken"); *Talbot v. Mobil Corp.*, 46 F.Supp.2d 468, 472 (E.D. Va. 1999).

The continuing violation theory (a type of equitable tolling) applies where the "plaintiff proves 'that it would have been impossible for a reasonably prudent person to learn that [an employment action] was discriminatory.'" *Olson v. Mobil Oil Corp.*, 904 F.2d 198, 200 (4th Cir. 1990) (*quoting Miller v. Int'l Tel. and Tel. Corp.*, 755 F.2d 20, 24 (2d Cir. 1985)). Such impossibility exists only where the plaintiff is unaware of the facts giving rise to the claim because the defendant has intentionally concealed them. *Id.* at 201. Defendant correctly argues that Plaintiff cannot sustain a claim of "continuing violation" in the present case. Plaintiff argues that Defendant's secretive promotion structure made it impossible for her to apply or be considered for promotions. Opp. at 25. There is no evidence in the record, however, that the process was secretive, though, as Defendant readily admits, the process is very informal. Plaintiff's own description of the process implies that the process is more informal than it is secretive. *See id.* at 27 (citing Defendant's explanation of non-traditional, noncompetitive system) and 28 (promotion opportunities were not required to be posted; no competition for promotions sought). Furthermore, Plaintiff fails to meet her burden of showing that she was unaware of this informal structure—a requirement for the application of the continuing violation exception. In fact, Plaintiff admits that she repeatedly made use of the promotion structure, "aggressively pursuing program management opportunities" and repeatedly

telling her department managers that she desired a management position. Opp. at 29. Such an admission indicates that Plaintiff was aware of the structure through which she must pass to obtain the promotion she desired.

In addition, following the *Olson* test, the Court finds that it was possible for a "reasonably prudent person" to learn that the alleged failure to promote was possibly discriminatory. Looking solely to her answer to Defendant's interrogatory, Plaintiff cites numerous and frequent alleged discriminatory acts evidencing Defendant's failure to promote Plaintiff, while promoting men whom Plaintiff aided in management duties. *See* Pl's Resp. Interrog. No. 3 ("March 1991-September 1992: Required to perform code 36 responsibilities without promotion whereas male members with similar responsibilities were code 36 or higher; December 1993-July 1994: Denied deputy program manager positions, given to male manager from outside department; July 1994-April 1996: Authority undermined as manager of a program and Plaintiff was replaced by a male manager who was given her office). Looking at the nature, frequency, and number of the alleged acts that Plaintiff states she considered to be discriminatory, the Court finds that a reasonably prudent person would have, at a point prior to December 1997 (the time of Plaintiff's EEOC complaint), questioned the existence of a discriminatory promotion process.

As Plaintiff cannot satisfy her burden of establishing the existence of a continuing violation, the Court's analysis will be restricted to Plaintiff's claim that Defendant failed to promote her in favor of three less experienced men and to her related claims of discrimination occurring within the 300 day period prior to filing her EEOC charge.

B. Proof Scheme for Discrimination Claim

In order to show intentional discrimination, the plaintiff can present either direct or indirect evidence. *Halperin v.*

Abacus Tech. Corp., 128 F.3d 191, 196 (4th Cir. 1997). The necessary proof to indirectly establish a claim of disparate treatment (such as the failure to promote) is encompassed within a three-part framework: (1) the plaintiff must establish a prima facie case of discrimination by a preponderance of the evidence, *id.*; (2) the burden then shifts to the defendant who must articulate a legitimate, nondiscriminatory reason for the adverse employment action, *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 254 (1981); and (3) the burden shifts back to the plaintiff to demonstrate that the reason offered by the employer is false, *Reeves v. Sanderson Plumbing Products, Inc.*, 120 S.Ct. 2097, 2106 (2000).[6] The Court finds, as explained below, that Plaintiff fails to adequately support her claim of discrimination, as she is unable to demonstrate that Defendant's reason for its failure to promote her is pretextual.

1. The Prima Facie Case

In order to establish a prima facie case of failure to promote, Plaintiff must show by a preponderance of the evidence that "(1) she is a member of a protected class; (2) there was an open position for which she applied or sought to apply; (3) she was qualified for the position; and (4) she was rejected for the position under circumstances giving rise to an inference of unlawful discrimination." *Evans v. Technologies Applications and Svc. Co.*, 80 F.3d 954, 958 (4th Cir. 1996). Plaintiff is clearly a member of a protected class. Defendant argues that Plaintiff cannot establish that she applied for a specific program management position, and thus fails to establish a prima facie case of discrimination. *See* Mot. at 20.

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[6] As Plaintiff correctly anticipated, the recent Supreme Court decision in *Reeves* overturned the Fourth Circuit's "pretext-plus" requirement, put forth in *Vaughn v. MetraHealth Cos., Inc.*, which made it necessary for the plaintiff to demonstrate not only that the employer's proffered nondiscriminatory reason is false, but that the employer's actions were motivated by discriminatory intent. 145 F.3d 197, 202 (4th Cir. 1998).

Plaintiff is correct in her assertion, however, that where an employer maintains an informal promotion selection process in which promotion positions are not posted or announced, formal applications are not accepted, and department managers select an employee for promotion based on their skills, qualifications and current job responsibilities, it is unnecessary for Plaintiff to demonstrate that she applied for a specific promotion position in order to meet the second prong of her prima facie case. *See Elguindy v. Commonwealth Edison Co.*, 903 F.Supp. 1260, 1267 (N.D. Ill. 1995).

In *Elguindy*, employees were not told when particular supervisory positions became available, or that they were being considered for such positions. Under those circumstance, the District Court for the Northern District of Illinois found that, although the plaintiff was unable to point to specific promotion positions in which she expressed an interest, the plaintiff, in order to satisfy the second prong of her prima facie case, was only required to show that had she known of a particular position, she would have applied. *Id.* The court further found that the plaintiff had satisfied that burden, as the evidence indicated that she repeatedly expressed her desire for promotion to her supervisors and requested that she be enrolled in courses teaching managerial and supervisory skills. The court found that "it is reasonable to infer that the plaintiff would have applied for (and accepted) a supervisory position had she been made aware of one." *Id.*

The facts of *Elguindy* parallel those of the present case. As previously noted, Defendant itself admits that it has a very informal promotion structure in which applications for program management positions are not accepted, positions are not posted, and department managers consider employees based on their skills and current job responsibilities. Mot. at 6-7; Leahy Dep. at 115; Overman Dep. at 50-51; Armor Dep. at 145. Considering this structure, it would be illogical to require Plaintiff to formally apply for a specific program

management position in order to satisfy the second prong of her prima facie case. As in *Elguindy*, Plaintiff has repeatedly expressed her desire for promotion, making Defendant aware of this desire. *See* Slyke Doc. 286, 1998 Performance Appraisal ("Lack of promotion to code 36 was discussed. Kevin will work with Karin this year to provide job opportunities which will warrant the code 36 job description. This included discussions of program/project management jobs"); Davis Dep. at 37 ("[W]e discussed what her desire would be . . . in terms of program and program opportunities"); Leahy Dep. 51-52 ("The discussion was specifically regarding Band 35 and whether or not that was a dead end, that it would preclude her future advancement to Band 3 [Code 36 and above]. I explained to her that it was not a dead end and that Band 35 was a position from which you could continue to be developed and be a candidate for further promotion").

Defendant admits its awareness of Plaintiff's continued interest in promotion by acknowledging that Plaintiff's department managers "actively worked with [P]laintiff to identify performance objectives and responsibilities on particular programs that would provide her with management opportunities." Mot. at 11. Moreover, Plaintiff repeatedly accepted positions that her department managers represented as leading to promotion opportunities, such as her positions on CyroRadar and RTIP. *See* Mot. at 12, 13. Thus, following the rationale in Elguindy, the court finds that it is reasonable to infer from Plaintiff's repeated expressions of interest in promotion and her initial acceptance of positions with the potential of leading to promotions that Plaintiff would have applied for (and accepted) a program management position had she been aware of one.

Plaintiff has also satisfied the third prong of her prima facie case, as the record adequately establishes that she was qualified for the management positions to which Reid,

Capelle and Tranchini were promoted. As noted above, Defendant admits to repeatedly placing Plaintiff in positions that Defendant claims had promotion possibilities, such as CyroRadar and RTIP. *See* Mot. at 12, 13. Moreover, Plaintiff's department manager, Mr. Leahy, testified that Plaintiff was capable of holding the positions Mr. Reid held. Leahy Dep. at 144. In regards to the duties pertaining to Mr. Capelle's position, Mr. Leahy testified that, "[Plaintiff's] technical background would have made the project more of [a] challenge for her but yeah, she could have handled that." *Id.* at 145.[7]

Assuming, as reasoned above, that Plaintiff meets the first three prongs of her prima facie case of failure to promote, Plaintiff must also establish that she was repeatedly rejected for advancement under circumstances giving rise to an inference of unlawful discrimination. This burden, as with the other elements of the prima facie case is not onerous. *See Burdine*, 450 U.S. at 253; *Young v. Lehman*, 748 F.2d 194, 197 (4th Cir. 1984)("burden of establishing a prima facie case is not a heavy one" and is a "relatively easy test"). That the promotions in 1997 and 1998 went to men, though Plaintiff "applied" and was qualified for management positions, is enough evidence for Plaintiff to meet this relatively easy burden. *See Emmel v. Coca-Cola Bottling Co.*, 95 F.3d 627, 629 (7th Cir. 1996) (inference of discrimination exists where a plaintiff establishes that she was in a protected class; that she was qualified for the promotion; that she did not receive

[7] Though Defendant is correct that there is no record of any of Plaintiff's managers "conceding" that Plaintiff could have done Tranchini's work, Defendant draws an invalid conclusion from that fact. Regardless of whether there is evidence that Plaintiff could have done Tranchini's job specifically, the record clearly demonstrates that Defendant apparently believed Plaintiff was qualified for management positions, as it repeatedly placed her on assignments with "promotional opportunities." *See* Mot. at 14.

the promotion despite her qualifications; and that a person not in the protected class was promoted instead) (*citing McDonnell Douglas*, 411 U.S. at 802).

2. Defendant's Legitimate Nondiscriminatory Reason and Plaintiff's Burden of Demonstrating Pretext

Assuming Plaintiff has met her initial burden, the burden then shifts to Defendant to provide a legitimate, nondiscriminatory reason for failing to promote Plaintiff. *See Burdine*, 450 U.S. at 253, 256. Defendant proffers that the men promoted were better qualified than Plaintiff for the positions. *See* Mot. at 33-34. As Defendant correctly argues, "[j]ob performance and relative employee qualifications are widely recognized as valid, non-discriminatory bases for any adverse employment decision." *Evans*, 80 F.3d at 960. Plaintiff, relying on various decisions from courts outside this Circuit, counters that Defendant is not entitled to use a "superior qualifications" rationale for its promotion decision where it failed to consider Plaintiff for the specific positions in question. *See* Opp. at 45-47 (*citing Lams v. General Waterworks Corp.*, 766 F.2d 386, 393 (8th Cir. 1985); *Ostroff v. Employment Exchange, Inc.*, 683 F.2d 302, 304 (9th Cir. 1982); *Nanty v. Barrows Co.*, 660 F.2d 1327, 1332 (9th Cir. 1981), *overruled on other grounds by, O'Day v. McDonnell Douglas Helicopter Co.*, 79 F.3d 756, 760-61 (9th Cir. 1996); *Townsend v. WMATA*, 746 F.Supp. 178, 186 (D.D.C. 1990); *Emmel v. Coca-Cola Bottling Co.*, 95 F.3d 627 (7th Cir. 1996); *Joshi v. Fla.State Univ. Health Ctr.*, 763 F.2d 1227, 1235 (11th Cir. 1985)). Plaintiff's reliance on these decisions is misplaced, however, as the cases relied upon are factually distinct from the case at hand. For example, in Lams, black employees suing under a failure to promote theory were segregated into one work unit of the company and were never told, even when they inquired, of promotion opportunities in other work departments so that they could be considered for such promotions. In both *Ostroff* and *Nanty*, the Ninth

Circuit resolved cases involving fact situations in which the defendants had no knowledge of plaintiff's qualifications whatsoever and, upon inquiry into job availability, the plaintiff was told that there were no available positions, though, in fact, one existed. Moreover, the Ninth Circuit in *Ostroff*, citing its prior decision in Nanty, indicated that the rule stated by the plaintiff applies only where a defendant "had no knowledge of, and no way of evaluating, [the plaintiff's] qualifications." 660 F.2d at 1332. In the present case, Plaintiff was not segregated in any way from those she identified as comparators. Furthermore, the record demonstrates that Defendant had knowledge of Plaintiff's qualifications, as it had hired her and repeatedly met with her to discuss positions in accord with her qualifications and skills. *See* Davis Dep. at 37-38; Mot. at 10-11 ("ARAD employees would discuss performance and promotion objectives with Mr. Davis during a yearly performance review"; "Mr. Davis's practice was to assist the employee in identifying objectives and program opportunities consistent with the employee's goals and demonstrated ability").

In *Townsend*, the United States District Court for the District of Columbia held that the defendant was not entitled to a "superior qualifications" explanation because it was evident that the defendant had "improperly and prematurely eliminated the plaintiff from consideration for the [promotion] vacancy" by denying the plaintiff an interview where the interview process was "a very important part of the applicant screening process." 746 F.Supp. at 181. Moreover, it was evident that the plaintiff had been prematurely eliminated as company documentation indicated that another candidate had been selected for the position, though the plaintiff was told thereafter that the position remained open and no final appointments had been made. *Id.* at 179-80. In the present case, there was no similar interview process, nor was there the deception as to the status of the selection process.

Plaintiff's reliance on *Emmel* is also misplaced as the facts there demonstrated that the defendant failed to raise its particular explanation for its failure to promote the plaintiff until trial. Under those facts, the Court did not disrupt the jury's finding that the particular explanation was pretextual and created post-hoc. 95 F.3d at 634.

Finally, the facts of *Joshi* are also crucially distinct from Plaintiff's case. In *Joshi*, the plaintiff's written application was repeatedly not considered for available job positions by those with decision making power. The Eleventh Circuit found that the plaintiff's qualifications were not known or considered by the relevant decision makers and, thus, the defendant was not entitled to a "superior qualifications" explanation. 763 F.2d at 1235. Here, as previously explained, the decision makers were clearly aware of Plaintiff's skills and qualifications.

Defendant's "superior qualifications" explanation, therefore, constitutes a legitimate, non-discriminatory reason for its failure to promote Plaintiff. Thus, the burden shifts back to Plaintiff to demonstrate that Defendant's proffered reason is false and merely pretextual. *See Reeves*, 120 S. Ct. at 2106. Plaintiff fails to satisfy this burden, as her two attempted methods of demonstrating pretext prove inadequate. First, Plaintiff attempts to demonstrate pretext by reference to statistical data. As this Court found in a recent failure to promote case, "statistical evidence has little, if any, relevance in an individual disparate treatment action." *Bostron v. Apfel*, 104 F.Supp.2d 548 (D. Md. 2000) (*citing McClosky v. Prince George's County, Md.*, 1996 WL 726854, at *1 (4th Cir. Dec. 18, 1996); *see also Opara v. Modern Mfg. Co.*, 434 F.Supp. 1040, 1044-45 (D. Md. 1977); and *Carmichael v. Birmingham Saw Works*, 738 F.2d 1126, 1131-32 (11th Cir. 1984). Moreover, in an individual disparate treatment action, as compared to a class action disparate treatment action, statistics alone are an insufficient means of demonstrating pretext. *Id.* (*citing Warren v. Hal-*

stead Industries, Inc., 613 F.Supp. 499, 506 n.2 (M.D.N.C. 1985)). Even were the Court to consider plaintiff's statistical evidence, it is highly questionable as to whether the proffered evidence would support a finding of pretext. Although Plaintiff is correct that the evidence demonstrates that Defendant was not promoting women within ESSS at the rate that it employs women in that department, the statistics offered demonstrate that women were being placed in management positions within ESSS (for which all SD&T employees, including those within ARAD, were eligible) at a percentage very near their total percentage employed within ESSS. *See* Opp. at 44 (the total percentage of women engineers employed in ESSS is 11.7%, and, in 1998, the year in which Plaintiff alleges the discriminatory promotions of Reid, Capelle and Tranchini occurred, 10% of 70 management positions were given to women engineers). The percentage difference is minimal and does not represent a significant disparity between the percentage of women promoted within ESSS and the total percentage of women making up the qualified labor pool for such promotions. Thus, Plaintiff's attempt to demonstrate pretext by reference to statistics fails.

Plaintiff, therefore, is left with the burden of demonstrating pretext by establishing that she was better qualified for the positions given to Reid, Capelle, and Tranchini.[8] The sole

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[8] Plaintiff is correct that, under the Supreme Court's decision in *Patterson v. McLean Credit Union*, a plaintiff is not required to demonstrate that she is better qualified to demonstrate pretext. 491 U.S. 164, 187-88. Plaintiff, however, misinterprets the import of *Patterson* in the present case. In *Patterson*, the Supreme Court simply held that where the plaintiff has an alternative means of demonstrating pretext available to her, she is not required to demonstrate, in addition, that she is better qualified in order to establish pretext. *See id.* Here, as explained above, Plaintiff's sole alternative means of demonstrating pretext, i.e., by reliance on statistics, fails. Thus, having offered no other means for demonstrating pretext, Plaintiff is now left with the burden of establishing that she was better qualified for the positions given to Reid, Capelle, and Tranchini.

evidence Plaintiff offers to establish that she was better qualified is her and her husband's subjective belief as to her qualifications as compared to those of Reid, Capelle and Tranchini. *See* Opp. at 49; Pl's Decl. ¶ 30. But as the Fourth Circuit held in *Lowery v. Circuit City Stores, Inc.*, "[t]he mere assertion [by the plaintiff] that [the plaintiff] was more qualified is insufficient to establish pretext." 158 F.3d 742, 763 (4th Cir. 1998), *vacated on other grounds*, 119 S. Ct. 2388 (1999). *Accord Vaughn v. Metra Health Cos., Inc.*, 145 F.3d 197, 202 (4th Cir. 1998).

Plaintiff erroneously points to Mr. Leahy's acknowledgment of Plaintiff's ability to do the jobs that were given to the three men and her "long and successful management and leadership experience in a broad range of programs" as evidence of her superior qualifications. *See* Opp. at 49. Evaluating the record in the light most favorable to Plaintiff, Mr. Leahy's acknowledgments, as well as Plaintiff's superior performance evaluations over the years and past management and leadership experience in a broad range of programs, merely demonstrate that Plaintiff was arguably *as qualified as* the three men promoted. Such evidence does nothing to establish that Plaintiff is *more* qualified—the burden which plaintiff must satisfy at the pretext stage. Because Plaintiff fails to meet her final burden of rebutting Defendant's legitimate non-discriminatory reason by demonstrating that Defendant's proffered reason is false, her claim must fail.

III. CONCLUSION

For the foregoing reasons, Defendant's Motion for Summary Judgment will be granted. A separate order will issue.

William M. Nickerson
United States District Judge

Dated: September 18, 2000.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

Civil Action WMN-98-2791

KARIN SKOLD VAN SLYKE,

v.

NORTHROP GRUMMAN CORPORATION.

ORDER

Pursuant to the foregoing memorandum, and for the reasons stated therein, IT IS this 18th day of September, 2000, by the United States District Court for the District of Maryland, hereby ORDERED:

1. That Defendant's Motion for Summary Judgment (Paper No. 84) is GRANTED; and

2. That Plaintiff's Motion to Strike (Paper No. 88) is DENIED as moot; and

3. That Defendant's Motion to Strike (Paper No. 91) is DENIED as moot;

4. That this action is hereby CLOSED;

5. That any and all prior rulings made by this Court disposing of any claims against any parties are incorporated by reference herein and this order shall be deemed to be a final judgment within the meaning of Fed. R. Civ. P. 58; and

6. That the Clerk of the Court shall mail or transmit copies of the foregoing memorandum and this order to all counsel of record.

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William M. Nickerson
United States District Judge